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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JAMES F. COTTER, Plaintiff and Appellant, v. SCHELLINGER BROTHERS et al., Defendants and Respondents.	A135014 (Sonoma County Super. Ct. No. SCV-241872)

In *Schellinger Brothers v. City of Sebastopol* (2009) 179 Cal.App.4th 1245 (*Schellinger I*), this court first encountered the controversy surrounding a proposed commercial development that had become ensnared in a bureaucratic and politically charged morass that saw the certification of an environmental impact report (EIR) stymied for five years. The frustrated developer sued the municipality for a writ of administrative mandate to halt the seemingly endless proceedings under the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq. (CEQA)). We held that none of the developer's statutory arguments could "be used to halt the decisionmaking process specified by CEQA that is still ongoing." *(Schellinger I, supra,* at p. 1250.) We specifically rejected Schellinger's central contention that one provision of CEQA—Public Resources Code section 21151.1—imposed a "mandatory, nonwaivable jurisdictional deadline" of one year for approval of an EIR. (*Id*. at pp. 1259-1261.)

In the course of developing the developer's statutory claims, we stated that "the developer's active participation in that process . . . amounts to laches," an additional

ground for denying relief. (*Schellinger I, supra,* at p. 1250.) We explained that "a significant portion of the extended delay was solely attributable to Schellinger, which was repeatedly revising the scope of its proposal," thereby adding "a dimension of complications that distinguished this proposed project from the run-of-the-mill development." (*Id*. at pp. 1268, 1270-1271.)

Those statements were the basis for this collateral, follow-up litigation between James F. Cotter, the owner of the land, and Schellinger Brothers, the proposed developer of the project.[1] Cotter sued Schellinger for breach of the contract to purchase the property. Cotter's position was that *Schellinger I* established as a matter of law that Schellinger breached the contract by taking an unreasonably long period of time to secure approval of the project. The trial court disagreed with this reading of *Schellinger I*, and after a bench trial, concluded that Schellinger's actions were reasonable. As part of its judgment, the court fixed a date by which Schellinger must secure final approval of the project by the municipality.

Both sides have appealed. Cotter reiterates that *Schellinger I* conclusively settled the issue of whether the developer's conduct was reasonable. On this point, we agree with the trial court. Schellinger contends the deadline fixed by the trial court was improper because it exceeded the pleadings and evidence. On this point, we further agree with the trial court, Schellinger having submitted that very issue for trial. With no showing of error, much less prejudicial error, we affirm the judgment.

[1] Schellinger Brothers appears to be family partnership. In addition to the partnership, brothers William and Frank Schellinger were named as defendants. These three defendants were hereafter collectively designated as Schellinger. In *Schellinger I*, we stated that Scott Schellinger, the son of William, and the longtime manager for the project, was "the current owner." (*Schellinger I, supra,* at p. 1250.) This misstatement was the result of a fleeting reference in one of Schellinger's filings in the massive administrative record. In further mitigation, we note that this discrepancy was not brought to our attention after we filed *Schellinger I.*

BACKGROUND

As might be gathered from our introductory remarks, the history of this dispute would bring tears to the eyes of a brass monkey. We set out most of it in *Schellinger I*:

"At issue here is the attempt of plaintiff and appellant Schellinger Brothers (Schellinger) to develop half of a site of approximately 20 acres in an area known as Laguna Vista within the limits of defendant City of Sebastopol . . . . [¶] Originally, in January 2001, Schellinger submitted an application to construct a project with 182 units of single-residence housing along with a neighborhood commercial center of 16,300 square feet. The City began preparation of an EIR for the project in this form.[2]

"The draft EIR was released for public comment in March 2002. Between April (when Schellinger formally resubmitted its application) and June of 2002, when the draft EIR was completed, Schellinger was continually making changes in the project. By June, when the first public hearing was conducted by the City's planning commission, the project was reduced to 177 units and the size of the commercial office center had been reduced.[3] After two public hearings, the planning commission accepted the draft EIR, with modifications.

"In August, as the city council was about to consider the draft EIR as approved by the planning commission, Schellinger again retinkered the project, dropping the number

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[2] "Not relevant here, except as it may explain the depth of Schellinger's commitment and its frustration with the City, is the period prior to 2001, which Schellinger described as follows in its complaint: 'The Laguna Vista project has been before the City . . . in various forms for almost ten years, starting in 1997, when a preliminary review application for 200 units of senior housing and commercial uses was submitted. A similar application was submitted in 1999. In 2001, Schellinger Brothers submitted another application to develop an age-restricted community on the project site, consisting of approximately 120 senior housing units with a commercial component. The City advised Schellinger Brothers not to pursue a senior housing project.' "

[3] "In its petition Schellinger alleged that by the time the proposal was taken up by the planning commission, the project had already been reviewed by the following 'City boards and commissions': (1) the Business Outreach Committee; (2) the Street Smart Sebastopol Citizens Committee; (3) the Design Review Board; and (4) the Laguna Implementation Committee."

of units to 172, as well as making other changes. After two public hearings, and while the council was considering the matter, Schellinger decided to resubmit its project proposal.

"Schellinger submitted its new proposal in May 2003. It sought approval of a project reconfigured with 145 units and no commercial center. The City deemed Schellinger's application complete on June 23, 2003.

"Thereafter, it became clear that the project implicated the City's open space ordinance, which would ordinarily require an analysis of the project separate from the EIR. However, with no objection from Schellinger, the City council decided to fold the open space analysis into the EIR. The City also decided to recirculate the draft EIR.

"In September 2003, the City engaged a firm to prepare the open space analysis and the draft EIR for recirculation. But it was not until November of that year that Schellinger could arrange for that firm to have access to the project site.

"The recirculated draft EIR was released for public comment in August 2004. Opposition to the project—which was considerable, as it had been from the beginning—caused the City to propound a large number of requests to Schellinger for additional information. This apparently continued through October 2005.

"The recirculated draft EIR was again considered by the planning commission in October and November 2005,[4] which recommended conditional approval of the

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[4] "During this period, there were several extraneous developments that deserve brief mention.

"First, the proposed project evoked a 2003 lawsuit by a public interest group dealing with an alleged violation of the City's open space ordinance. This litigation was apparently dismissed in October 2005.

"The second development partakes of the bizarre. As Schellinger states it in its opening brief: 'In April 2005, while review of the Recirculated Draft EIR was still ongoing, project opponents entered the . . . property and claimed that they had found Sebastopol Meadowfoam, an endangered plant species. The State Department of Fish and Game launched an investigation and conducted site visits in April and May of 2005. The investigation concluded that the Meadowfoam had been transplanted artificially, which triggered a criminal investigation. The Department then advised the City that the

recirculated draft EIR. The City Council took up the matter on December 6; the persistent opposition to the project was still vocal, and, at Schellinger's request, the matter was continued to January 2006. In February 2006, the council gave Schellinger the opportunity to submit a comprehensive response to questions and comments from both the council and the public about the project.

"In May 2006, matters were approaching the point where the city council had scheduled a vote on the recirculated draft EIR. Apparently in response to the public opposition,[5] Schellinger again modified the proposal by reducing the number of units to 125. However, before an actual vote, the City and Schellinger agreed to undergo a mediation of the project controversy.

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illegal transportation of nonnative Meadowfoam on to the site "should not affect the environmental review process." ' The City, while not accepting that it may have been "opponents" of the project that were responsible for this 'illegal transportation,' does not disagree with the essentials of the narrative provided by Schellinger. Again, there is no conclusion to the criminal investigation, which was still ongoing when this litigation commenced. There is nothing in the record which suggests that this investigation in any way impeded or had any substantive impact on the administrative proceedings. Earlier, in September 2004, the possibility of an endangered species of bird on the site was raised before the city Planning Commission, which was advised that the birds might return to the site for future nesting. There was also a question—subsequently answered in the negative—about whether a species of salamander inhabited the site.

"Finally, there was a lingering question as to whether part of the site was also subject to federal jurisdiction. It was not until 2008 that the question was conclusively answered in the negative. (See *Northern California River Watch v. Wilcox* (N.D.Cal.2008) 547 F.Supp.2d 1071 [summary judgment granted Schellinger and Department of Fish and Game employees on ground of no federal jurisdiction under federal Clean Water Act].)"

[5] "A large portion of the administrative record (vols. 17–36, pp. 4166–8518) is devoted to 'correspondence' generated by the project. Much of it is the sort of routine, behind-the-scenes notes, letters, and emails common among officials, attorneys, and consultants. However, much of it is from the public, and was overwhelmingly hostile to the project."

"Almost a year passed before another revised proposal, this one based on the mediation,[6] was set to go to the city council. The number of units remained at 125 but the commercial space component was revived, although the square footage was now fixed at 2,335. However, majority support on the city council could not be mustered for the mediated project. Schellinger demanded that 'the City comply with its legal duty to approve the 145–unit Laguna Vista Project' as proposed in Schellinger's May 2003 application. The City scheduled a council meeting for June 5, 2007, to consider approving the recirculated draft EIR and the project in its latest form.[7] At this point the city council decided that the draft EIR should again be recirculated for further public comment and additional analysis on certain environmental issues.

"For Schellinger, this was the final straw. Schellinger refused to pay for what the City's termed 'further processing,' whereupon the City 'halted the administrative proceeding.'[8] Schellinger's next move was to commence this litigation." (*Schellinger I, supra*, at pp. 1250-1253.)

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[6] "Both Schellinger and the City refer to this proposal as 'the mediated project' in their briefs. The mediation was conducted by a retired superior court judge among Schellinger, two members of the city council, a private group calling itself the Laguna Preservation Council, and the representatives of owners and residents of a nearby mobilehome park."

[7] "Special counsel for the City advised recirculation because 'The draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded.' "

[8] "The final administrative action shown by the record occurred on July 17, 2007, when the city council ordered preparation of a recirculated draft EIR devoted to three issues: (1) 'Additional analysis . . . regarding adequacy of water supply for the proposed project'; (2) 'Additional analysis . . . regarding the potential effects of the project on the endangered plant species Sebastopol Meadowfoam'; and (3) 'a reasonable range of alternatives to the Project including: [¶] An alternative that would reduce or eliminate the Project's significant impact on wetlands on-site and that could feasibly attain Project objectives. [¶] An alternative that avoids wetlands on-site and that could feasibly attain Project objectives. [¶] Identification of the environmentally superior alternative under CEQA.' "

When we filed our opinion in *Schellinger I* in December 2009, we did not know that Cotter had reached the limit of his patience. No longer willing to pay $16,000 per month to service the property, [9] Cotter had commenced this action more than two years earlier, in November 2007. Two causes of action were alleged in his complaint, the first for breach of contract and the covenant of good faith and fair dealing, the second for declaratory relief. Before summarizing those causes of action, it is highly relevant to examine the contract between Cotter and Schellinger.

Cotter alleged that in 1998 he and Schellinger executed an agreement for the conditional sale of the Laguna Vista property.[10] The agreement specified that Schellinger would pay a total price $2,775,000 in stages: (1) the immediate payment of $10,000 "now on deposit" in an escrow account; (2) $15,000 if Schellinger, within 30 days "after the City of Sebastopol's adoption and certification of the EIR . . . accept[s] the conditions of the EIR as being economically feasible and not unreasonable to the development of the project"; (3) $25,000 within 30 days after Schellinger's "receipt of the approved tentative map"; (4) $782,500 "down payment in the form of cash at the close of escrow" (which the parties agreed would be 60 days "after recordation of final subdivision map from the City of Sebastopol"); and the balance of "from a 70% construction loan, which shall be applied for and approved prior to close of escrow."

The heart of Cotter's complaint was the following:

"[S]ection 6 of the Purchase Agreement requires the Buyer to 'promptly apply for and diligently attempt to obtain approvals from Sebastopol, California and keep

[9] Cotter testified that from May 1998 through May 2011 he had expended $1,179,255.88 while the property was immobilized by the administrative process.

[10] The complaint recites that the purchase agreement "is attached to this complaint as Exhibit A and incorporated by this reference." However, Cotter did not include the agreement in his appellant's appendix. Schellinger included it in their respondent's appendix.

[Plaintiff] informed in writing of [Buyer's] progress on a quarterly basis.'[11] Also pursuant to section 6 of the Purchase Agreement, Buyer's obligations under the Purchase Agreement are subject to the Buyer 'obtaining all approvals for a final subdivision map from the City of Sebastopol, California.' "

"Section 7 of the Purchase Agreement provides that Plaintiff's obligation to perform under the Purchase Agreement is subject to '[Buyer's] performance of all of the obligations which it is required to perform pursuant to this Agreement.' "[12]

Cotter further alleged his entitlement to declaratory relief to the effect that he "is excused from all performance obligations under the Purchase Agreement and thus presently has the right to terminate the Purchase Agreement" "due to . . . Buyer's failure to obtain all approvals for a final subdivision map from City of Sebastopol."

As relevant here, Cotter prayed for: (1) judgment, "general and compensatory damages according to proof at trial" on the breach of contract cause of action; (2) declaratory relief that Cotter "is excused from all performance obligations under the Purchase Agreement and thus presently has the right to terminate the Purchase Agreement"; (3) costs and attorney fees as allowed by the Purchase Agreement; and (4) "other such relief as the Court may deem just and proper."

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[11] Cotter claimed at the trial that Schellinger failed to make these progress reports, but he does not renew that claim on this appeal.

[12] Section 6 (Conditions to Purchaser's Performance) of the Purchase Agreement provides in pertinent part: "Purchaser's obligation to perform under this Agreement is subject to the following conditions: [¶] Purchaser's obtaining all approvals for a final subdivision map the City of Sebastopol, California for a Master Planned Development including adult living community and consisting of 220 units of mixed use. Purchaser shall promptly apply for and diligently attempt to obtain approvals from Sebastopol, California."

Section 7 (Conditions of Seller's Performance) provides in pertinent part: "Seller's obligation to perform under this agreement is subject to satisfaction of the following conditions: [¶] Purchaser's performance of all of the obligations which it is required to perform pursuant to this Agreement."

Schellinger's answer denied these allegations and raised a number of affirmative defenses, among which were estoppel, waiver, laches, and that Schellinger's conduct was "approved and ratified" by Cotter.

The matter was tried to Judge Rene Chouteau in a three-day bench trial ending on June 2, 2011. The court commenced the proceedings by advising counsel that it had read their trial briefs (neither of which are included in the record on appeal). Judge Chouteau then advised counsel: "I see there are two questions. The first is the reasonable time for performance to be implied into the contract, where none was stated, and that's a legal question I need to answer. And the second is whether they [Schellinger] were reasonable in terms of how they proceeded." Cotter's counsel replied, "Right," and Schellinger's counsel did not disagree. After taking judicial notice of the opinion in *Schellinger I*, the court then heard testimony from seven witnesses: commercial real estate broker Robert Green, who had acted as Cotter's agent in the negotiations leading up to the purchase agreement; civil engineer John Macy, an expert on the approval process for subdivision maps ; Sebastopol Planning Director Kenyon Webster; Cotter; Scott Schellinger, the son of defendant William Schellinger, and Schellinger's manager for the project; land use attorney Geoffrey Robinson, who had been one of Schellinger's counsel of record in *Schellinger I*; defendant William Schellinger; and land use attorney Cecily Barclay, who had been Schellinger's strategist and counsel in the administrative proceedings before the City from 2003 to 2007, and who still advised Schellinger.

In his closing argument, Cotter's counsel asked for monetary damages of approximately $30,000, and that he "be allowed to terminate this deal" so that the parties can "go on their way, and this ugly, painful situation not be continued."

Counsel for Schellinger was presenting his closing argument when the court posed a question:

"THE COURT: Let's assume we enforce the literal terms of the contract. Is it your position that if this application goes on for 40 or 50 more years that the heirs of these parties will still be bound by the contract?

"MR. GLAUBIGER: I think at some point it should come to an end and it can come to an end, but I think—

"THE COURT: What point is that?

"MR. GLAUBIGER: Well , . . . [¶] . . . [¶] . . . I think Mr. Robinson testified there were projects that he was involved in that can be as long as 20 years.

"THE COURT: You think that's a reasonable time to tie up this property, 20 years?

"MR. GLAUBIGER: [¶] . . . [¶] My answer to that would be yes, because the City is acting reasonably . . . [¶] . . . [¶]

"THE COURT: You think the City's been reasonable to date?

"MR. GLAUBIGER: I think the City has.

"THE COURT: I am not sure the Court of Appeal said that.

"MR. GLAUBIGER: I don't think they did either.

"THE COURT: I read them to say that the Schellingers were cooperative, that that put them under . . . laches and the Court wasn't going to order the City to perform within a year. Period."

Schellinger's counsel then argued that the issue of fixing a time for completing performance was not properly before the court for decision: "[N]umber one, if [Cotter] wanted to bring an action to this Court saying, tell us what a reasonable time is, we could have properly prepared for that argument because . . . what you can look forward to is somewhat amorphous because that's not an issue. That is framed by the pleadings, not an issue of what is going to happen in the future, how much longer is this going to take."

Judge Chouteau announced his decision from the bench, beginning by noting "I believe that the terms of the contract itself are clear, and there is no need to go beyond the terms of the contract. [¶] . . . [¶] The parties to this contract are both very sophisticated, knowledgeable people in the area of . . . negotiation of real estate development deals . . . . I believe both sides were represented by attorneys and real estate brokers that were knowledgeable. So I believe that was the intent of the parties as indicated in the agreement. However, as Mr. McOmber [Cotter's counsel] has argued, if no time is

specified for performance . . . , then the court must determine a reasonable time of performance in order to have a valid and binding contract between the parties. That is exemplified in Civil Code Section 1657, which does state the principle. The principle is also recognized by defendants in their answers to interrogatories in which asked what would be the time for performance indicated that it would be a reasonable time.[13]

"Then the question before the court does not involve what was the intent of the parties when the contract was entered into. That was the clear intent that that escrow is to close upon filing of the final map. The question is, what is a reasonable time for fulfilling that condition? To put it another way, what would be the expectation of a reasonable person in light of the facts and circumstances surrounding this particular contract."

The court then noted why this was hardly a routine proposal: "[T]he public in Sebastopol was interested in this development project. The city council seems to have an appetite for further hearings and gathering of further information in light of the citizen participation. There were three separate lawsuits . . . [I]t is reasonable for sophisticated negotiators as we have here entering into a contract to realize that Sebastopol is a place where developing projects [is] more difficult to put through . . . ."

"I also want to deal with the issue as to whether the Schellingers . . . acted reasonably and with appropriate diligence in pursuing this project [or] whether they were guilty of unreasonable delays in obtaining approvals as alleged in the first cause of action.

[13] The court was referring to a special interrogatory from Cotter and Schellinger's answer: "Explain YOUR understanding, at the time YOU entered into the PURCHASE AGREEMENT gave YOU to obtain approvals for a final subdivision map from the City of Sebastopol, California." "A reasonable time under the circumstances." Counsel for Cotter in his closing argument had told the court that the purchase agreement had an "implied provision . . . that allows [Schellinger] a reasonable time to perform," a provision that was implied "by the operation of law" and "by virtue of the . . . interrogatories."

"First of all, the Schellingers have expended substantial sums in pursuing the project and had significant roadblocks. Community opposition seems to be somewhat greater in this case than in most projects. The approach the City took in requiring multiple and additional public hearings and also the three lawsuits against the project. . . . . Mr. McOmber has argued that the Schellingers delayed the project by . . . revising the project several times. In . . . *Schellinger v. City of Sebastopol*, the Court of Appeal characterized these changes as unreasonable, which Mr. McOmber relies on in support of his position. My interpretation is that in the context of this lawsuit and the question of what was reasonable, and that Schellingers' actions were reasonable in trying to accommodate the community and city in reducing the density of the development to meet the needs of the community. The Court of Appeal's decision, although binding in this court, has to be read in the context of the facts and the claims before the court, and the issue in that case was whether the City had violated the statute [Public Resources Code section 21151.5] which requires approval to be within a year. In that context, the Court of Appeal determined that the Schellingers' project caused the City to not meet the one-year deadline . . . . Another way to state that would be it is unreasonable for the Schellingers to come into court to sue the City as to the one-year limitation [when they] themselves had participated in the process that extended beyond a year. I do not interpret that to mean that their efforts to meet the needs of the community by revising the project to be unreasonable in any sense."

"I think the analysis of the mediation is similar. The Schellingers, in order to try to deal with the issues raised by the community, carried on a . . . mediation that lasted approximately a year. As a matter of fact, it appeared to be successful and resulted in an agreement in the mediation only to be rejected by the City Council . . . . I find this participation to be reasonable in trying to get a very difficult project approved by the City.

"Mr. McOmber also raised the issue of filing a lawsuit against the city [as] unreasonable activity by the Schellingers. In hindsight, it was ill-advised to bring a suit which ultimately failed both in the trial court and the Court of Appeal, and resulted in

some delay in the project. On the other side, they were advised by attorneys with a high degree of expertise in the field and relied on their attorneys . . . .

"I do find that the Schellingers' pursuit of the approval of the final map has been reasonable in this matter given the adversities that they faced. [¶] . . . [¶]

". . . So given all of the above, it comes down to the Court to determine what the reasonable time for performance would be. I'm going to do that based on the evidence of presented to me by Mr. Macy and . . . Ms. Barkley and by Mr. Robinson. I'm going to find that a reasonable time for performance of the condition obtaining the final map given the further prospect it would . . . expire June 1, 2013."

Cotter and Schellinger filed timely notices of appeal.

DISCUSSION

Cotter's Appeal

The Nature of the Issue And The Standard of Our Review

At the outset we are met by a profound disagreement between the parties as to the appropriate standard of review. But before addressing that disagreement, something of an anomaly must be considered.

The parties agree to the application here of Civil Code section 1657, which specifies that "If no time is specified for the performance of an act required to be performed, a reasonable time is allowed." The anomaly is that the contract here *does* fix the time for performance. Because that time has not yet occurred, it appears that Schellinger might simply stand on the literal terms of the contract and claim no that breach has yet occurred. For some unexplained reason, Schellinger chose not to do so. Perhaps, as evidenced by its discovery response cited by the trial court (see fn. 13 and accompanying text, *ante*), Schellinger accepted that it was required to move to performing its side of the contract in a reasonable period of time. If so, it is puzzling why both sides produced so much testimony at the trial concerning the negotiations preceding execution of the purchase agreement. In any event, we must allow Schellinger to adopt

the trial strategy it deems best, and Schellinger does not take issue with Cotter's statement in its brief that "the contingency in the contract . . . does not go on forever. It is subject to an implied term of 'reasonable time.' " Thus, like the trial court, and the parties, we accept that the quoted language of Civil Code section 1657 states the governing rule of decision.

Where a contract for the sale of land fixes no time for the making of the payment of the purchase price, the buyer is allowed a "reasonable time." (Civ. Code, § 1657; *McGibbon v. Schmidt* (1916) 172 Cal. 70, 75; *Hannan v. McNickle* (1889) 82 Cal. 122, 124-125.) Just what amount of time qualifies as reasonable is ordinarily an issue of fact (*Hoppin v. Munsey* (1921) 185 Cal. 678, 684; *Kotler v. PacifiCare of California* (2005) 126 Cal.App.4th 950, 956) based on all relevant circumstances, such as the situation of the parties, the nature of the transaction, and the circumstances of the particular case.[14] (*Sawday v. Vista Irrigation Dist.* (1966) 64 Cal.2d 833, 836; *D. A. Parrish & Sons v. County Sanitation Dist.* (1959) 174 Cal.App.2d 406, 410.) Schellinger, consistent with the trial court deciding the matter on the basis of Civil Code section 1657, urges the issue to be reviewed in accordance with the substantial evidence standard.

But Cotter, consistent with the position he took in the trial court, sees the issue as simply one of compliance with *Schellinger I*, and thus a question of law, calling for de novo independent review. He contends that "reasonable time for performance on a contract cannot come from unreasonable delay," that in *Schellinger I* this court "found Schellinger to be at fault for the delays that caused the City to fail to meet the one-year deadline to certify the EIR," and thus the trial court erred when it "dismissed" those "findings," thereby "refusing to follow" and "respect" our decision. Judge Chouteau's ruling was not only "mysterious," Cotter asserts, it was "wimpy." Invoking the principle

[14] However, when "the essential facts are undisputed and only reasonable inference may be drawn therefrom, the issue of unreasonable delay . . . is a question of law." (*Allstate Ins. Co. v. Gonzalez* (1995) 38 Cal.App.4th 783, 790; cf. *Otis v. City and County of San Francisco* (1915) 170 Cal. 98, 100 [issue of unreasonable delay determined from face of complaint].)

of stare decisis, Cotter rhetorically asks: "Given the same facts, the same project, the same city, the same developer, the same time frame (both the Court of Appeal in Schellinger and the trial court in this case reviewed the facts from the inception of the Project) how can the trial court dismiss, out of hand, the opinion of the Court of Appeal," and then answers his own question this way: "the trial court lack[ed] discretion to ignore or dismiss the . . . opinion of the Court of Appeal."

No court of review likes to think a carefully-considered decision is being ignored, dismissed, or shown no respect by a court of first impression. We are happy to conclude that nothing of the sort happened here.

"Under the doctrine of stare decisis, all tribunals exercising inferior jurisdiction are required to follow decisions of courts exercising superior jurisdiction." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) "An appellate decision is not authority for everything said in the court's opinion, but only 'for the points actually involved and actually decided.' " (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620.) The classic statement dates to 1860: "A decision is not . . . authority except upon the point actually passed upon by the Court and directly involved in the case." (*Hart v. Burnett* (1860) 15 Cal. 530, 598.) "To determine the precedential value of a statement in an opinion, the language of that statement must be compared with the facts of the case and the issues raised. Only statements necessary to the decision are binding precedents explanatory observations are not precedent." (*Western Landscape Construction v. Bank of America* (1997) 58 Cal.App.4th 57, 61.)

This is how Cotter views our prior opinion: "In *Schellinger*, there were eight causes of action. The Court of Appeal reviewed three of them: the first, fourth, and fifth causes of action, which were titled 'Violation of Anti-NIMBY statute' (Gov. Code, § 65589.5), 'Breach of Contract Regarding Processing Costs,' and 'Breach of Mediation Agreement,' respectively. [¶] . . . [¶] In looking at these causes of action, the Court of Appeal focused on one universal element: Did the City unreasonably delay the approval of the EIR past the one-year period for approval as set forth in Pub. Resources Code § 21151.5 . . . and did this delay result in approval of the project by operation of law?

The court found that there is no automatic approval provision and the time limits are directory rather than mandatory. The court explained that one of the things that could reasonably extend the time period for approval would be the unreasonable delay of the developer and acquiescence to the City's delay. The court determined that this is exactly what happened." This characterization is only partially correct—and misreads our opinion.

Schellinger I was first and foremost a CEQA case, as was made clear from the start of the opinion:

"This appeal shows that frustration is not enough to justify premature judicial action that would short-circuit the decision-making process intended by CEQA.

"In *Sunset Drive Corp. v. City of Redlands* (1999) 73 Cal.App.4th 215 (*Sunset Drive*), the Court of Appeal held that a cause of action could be alleged to warrant issuance of a writ of *traditional* mandate under Code of Civil Procedure section 1085 compelling action by a city council that was refusing to make a decision on whether to certify an EIR. The developer here has seized upon *Sunset Drive* to support the extraordinary proposition—apparently advanced in earnest for the first time since CEQA was enacted—that a court is authorized to issue a writ of *administrative* mandamus to compel a city council to certify a proposed EIR, even though the council had decided that the pending draft EIR required recirculation to address new issues.

"Certain that the *Sunset Drive* court never imagined that such a construction would be placed on its opinion, we reject that construction, and thus reject the developer's contention that the one-year time limit for certifying an EIR established by section 21151.5 of CEQA constitutes an iron-clad, one-size-fits-all rule that permits of no exception. We reach the same conclusion concerning the impact of Government Code section 65589.5: it too cannot be used to halt the decisionmaking process specified by CEQA that is still ongoing. Finally, we conclude that the developer's active participation in that process for more than three years—which included numerous changes in the size and composition of the project—after the date it now claims the city lost its discretionary

jurisdiction amounts to laches, an accepted ground for relaxing the directory deadline of section 21151.5.

"In light of these conclusions, we affirm the trial court's decision not to interject itself into the still ongoing process of preparing an EIR." (*Schellinger I, supra,* at pp. 1249-1250.)

We began with an examination of "The Role and Preparation of the EIR" because the arguments pressed by Schellinger "can only be appreciated with an understanding of the nuts and bolts process from which a final EIR emerges from the CEQA process." (*Schellinger I, supra,* at pp. 1256-1259.)

Next we considered what we termed the "the nub" and "the wellspring of Schellenginer's position" and concluded, "Section 21151.5 Does Not Support Schellinger's Contention That an EIR Must Be Certified Within One Year After It Is Deem Submitted." (*Schellinger I, supra,* at pp. 1259-1261.) Then we determined that "The Housing Accountability Act (Gov. Code, § 65589.5) Likewise Furnishes No Support to Schellinger's Position." (*Id*. at pp. 1261-1262.) Next we distinguished *Sunset Drive* and explained "three reasons why that decision cannot be regarded as controlling here." (*Id*. at pp. 1262-1265.) The third reason was that, "while *Sunset Drive* accepted the focused promptitude of the project applicant as a given, the situation here is entirely different. While delay attributable to the applicant figured as a hypothetical possibility in *Sunset Drive,* here it is a tangible reality—shown by an extensive record—that Schellinger was hardly a passive participant in the lengthy administrative proceedings. Whether framed in the language of waiver, estoppel, laches, or forfeiture, a very good case can be made that Schellinger did not seek relief in a timely fashion. Schellinger's current view of the compulsory nature of the one-year period in section 21151.5 is not one it expressed until very long after that period had run. [¶] Although the City asks that Schellinger's appeal be blocked as a matter of waiver, we see the issue as one of laches." (*Schellinger I, supra,* at p. 1267, fns. omitted.)

In the course of explaining that conclusion, we made the following statements: (1) "It is important to note that a significant portion of the extended delay was solely

attributable to Schellinger, which was repeatedly revising the scope of its proposal."; (2) "the administrative record shows that 'the one-year deadline' [of section 21151.5] came and went without a word of protest from Schellinger"; (3) "it was not until sometime in September of 2004 that the first time-related rumbling came from Schellinger[] . . . . Nevertheless, Schellinger spent almost an entire year in a voluntary effort to mediate with the City"; and (4) "Thus, for almost three full years after Schellinger now insists the City had no discretionary power, Schellinger was in effect asking the City to exercise that power—and cooperating with City as it continued to exercise it. This is abundant support for a determination that Schellinger itself acted with unreasonable delay, and that it acquiesced in the City taking more than a year to certify an EIR." (*Schellinger I, supra,* at pp. 1268-1270.)

It is clear from this exposition of our previous opinion that the topic of Schellinger's delay was hardly the point directly involved and actually decided. (*Santisas v. Goodin, supra,* 17 Cal.4th 599, 620; *Hart v. Burnett, supra,* 15 Cal. 530, 598.) *Schellinger I* was a statutory decision, specifically a CEQA decision, and, even more specifically, a Government Code section 21151.1 decision. *Sunset Drive* was not only another CEQA decision, but also another section 21151.1 decision. Even Cotter recognizes that the "universal element" of *Schellinger I* was whether the City of Sebastopol had unreasonably delayed acting on Schellinger's application. Thus, even our discussion of Schellinger's "unreasonable" delay occurred in the statutory CEQA context, where the opponent was not a private party, but the City of Sebastopol. And, in a case devoted to the issue of a statutory deadline, we certainly did not, as Cotter claims, "[explain] that one of the things that could reasonably extend the time period . . . would be the unreasonable delay of the developer." The discussion in *Schellinger I* about the developer's delay was simply one of three reasons we declined to read *Sunset Drive* as an alternative source for a deadline. That discussion was "supplementary," not "necessary to the decision." (*Western Landscape Construction v. Bank of America, supra,* 58 Cal.App.4th 57, 61.)

Schellinger I was about the claimed delay by the City of Sebastopol in approving an application. This case is about the claimed delay by the developer that submitted that application. Our opinion never mentioned either Cotter or his purchase agreement with Schellinger, or Civil Code section 1657. What may constitute unreasonable delay facing a fixed statutory calendar and a municipal opponent is a very different matter from the situation where the reasonable time for performance of a contract between private parties is measured by factors that may range from the merely subjective to the historically idiosyncratic, i.e., whatever may be encompassed within " 'the circumstances of the particular case.' " (*D.A. Parrish & Sons v. County Sanitation Dist*., *supra*, 174 Cal.App.2d 406, 410.)

Judge Chouteau's characterization of *Schellinger I* was not contumacious and certainly not "wimpy." It was eminently sound and correct. That decision is not stare decisis for the principle that Schellinger was responsible for unreasonable delay for purposes of Civil Code section 1657 as applied to this contractual dispute between Cotter and Schellinger. In light of this conclusion, there is no basis for treating Schellinger's actions with the city as unreasonable as a matter of law, or that independent review is appropriate. Thus, the issue presented is simply whether Judge Chouteau's decision is supported by substantial evidence.

Cotter Fails To Establish Reversible Error

" 'Where findings of fact are challenged on a civil appeal, we are bound by the "elementary, but often overlooked principle of law, that . . . the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted," to support the findings below. [Citation.] We must therefore view the evidence in the light most favorable to the prevailing party, giving it the benefit of every reasonable inference and resolving all conflicts in its favor in accordance with the standard of review so long adhered to by this court.' " (*Bickel v. City of Piedmont* (1997) 16 Cal.4th 1040, 1053.) But before we start that inquiry, we presume the record contains sufficient evidence to sustain every factual determination made by Judge Chouteau, and it is Cotter's burden, as the appellant, to demonstrate that

this presumption is unsound. (E.g., *In re Marriage of Fink* (1979) 25 Cal.3d 877, 887; *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

Cotter makes only a token effort to shoulder this heavy burden. He does cite to some favorable testimony in his brief, but the most cursory comparison with Schellinger's brief demonstrates just how much was left out. " 'A claim of insufficiency of the evidence . . . consisting of mere assertion without a fair statement of the evidence, is entitled to no consideration when it is apparent . . . that a substantial amount of evidence was received on behalf of the respondents. Instead of a fair and sincere effort to show that the trial court was wrong, appellant's brief is a mere challenge to respondent's to prove that the court was right. . . . An appellant is not permitted to evade or shift his responsibility in this manner.' " (*Grand v. Griesinger* (1958) 160 Cal.App.2d 397, 403.) Schellinger met Cotter's challenge, but the disparity in evidentiary summaries is so great that we summarily reject Cotter's attempt to persuade us that substantial evidence does not support Judge Chouteau's finding that Schellinger had acted reasonably. (*In re Marriage of Fink*, *supra*, 25 Cal.3d 877, 887-888; *Foreman & Clark Corp. v. Fallon*, *supra*, 3 Cal.3d 875, 881.)

Cotter actually expends more effort to finding another issue of law that will let *Schellinger I* trump the substantial evidence analysis. The effort appears to stem from this statement in our prior opinion: "Whether framed in the language of waiver, estoppel, laches, or forfeiture, a very good case can be made that Schellinger did not seek relief in a timely fashion." (*Schellinger I, supra*, at p. 1267, fn. omitted.) Cotter argues that "The same is true of this current case, where this identical issue is again before the Court. Legal theories of waiver, laches, forfeiture, collateral estoppel, . . . and res judicata all come to mind and should be considered in this appeal." Apart from paraphrasing the *Schellinger I* excerpt just quoted, only laches was developed in Cotter's closing argument.

But Cotter's brief discussion of "waiver and laches" in his brief is merely a reframing of the argument that the statements in *Schellinger I* about Schellinger's delay is

dispositive to this litigation. Having already rejected this argument in its original form, there is no need for reiteration.

Cotter gives greater emphasis to the possibilities of collateral estoppel and res judicata. To Schellinger's protestation that these issues are being raised for the first time, Cotter concedes "the actual words . . . may not have been uttered by counsel at trial," but submits it is "disoriented logic" that such omission should foreclose consideration because the concepts of issue and claim preclusion permeated the trial. The logic is not "disoriented" but a bedrock principle of appellate practice reflecting elemental fairness to the opposing party and the trial court. (E.g., *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 830; *Mattco Forge, Inc. v. Arthur Young & Co*. (1997) 52 Cal.App.4th 820, 847; 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 400, p. 458.) The issues were therefore not preserved for review. (*JSJ Ltd. Partnership v. Mehrban* (2012) 205 Cal.App.4th 1512, 1526 [res judicata]; *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 332 [collateral estoppel].) True, as Cotter urges, we have discretion to relax this rule (*Batt v. City and County of San Francisco* (2010) 184 Cal.App.4th 163, 175-176), but we see scant point in doing so when the substance of these issues has already been considered and rejected.

Schellinger's Appeal

Schellinger contends "the trial court exceeded its jurisdiction by inserting into the contract a deadline to obtain final map approval" because "the issue of how much additional time would be reasonable for the Schellingers to secure final map approval . . . was not raised by the pleadings or argued in the trial court."

Code of Civil Procedure section 580, subdivision (a), provides that "the court may grant the plaintiff any relief consistent with the case made by the complaint and embraced within the issue." Cotter's prayer for general relief authorized the court to grant any relief consistent with the allegations of the complaint and the evidence. (*Singleton v. Perry* (1955) 45 Cal.2d 489, 498-499; *Babbitt v. Babbitt* (1955) 44 Cal.2d 289, 293.) The same is true for Code of Civil Procedure section 1060 governing declaratory relief.

(*Westerholm v. 20th Century Ins. Co.* (1976) 58 Cal.App.3d 628, 632, fn. 1; *Knox v. Wolfe* (1946) 73 Cal.App.2d 494, 505.)

Here, both sides have invoked Civil Code section 1657 to the trial court, a statute which expressly authorizes the allowance of "a reasonable time" for performance. Both sides voiced no disagreement when Judge Chouteau at the start of trial identified the "reasonable time for performance" as one of the issues "I need to answer." Having done so, Schellinger is in no position to complain when the trial court does exactly that. (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403; *Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1414-1415; 9 Witkin, Cal. Procedure, *supra*, Appeal, § 390, p. 449 ["The appellant cannot submit all issues for determination and then claim that that the trial court erred in deciding them."]; cf., *id.*, § 407, p. 466 ["Where the parties try the case on the assumption that . . . certain issues are raised . . . , neither party can change this theory for purposes of review on appeal."].) This is particularly so in this instance, when both sides devoted so much attention at trial to whether Schellinger's past efforts amounted to just that "reasonable time." Having already determined that those efforts did not amount to an unreasonable time, the court was entirely within its legitimate authority to take the next step and determine what would be "a reasonable time."[15]

Schellinger contends that by doing so, the court failed to heed what we said in 1964: "The courts cannot make better agreements for parties than they themselves have been satisfied to enter into or rewrite contracts because they operate harshly or

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[15] Something the courts are called upon to do in a variety of contexts. (See, e.g., *Catlin v. Superior Court* (2011) 51 Cal.4th 300, 306 [motion for postconviction discovery under Pen. Code, § 1054.9 must be made "within a reasonable time"]; *Allen v. California Water & Tel. Co.* (1947) 31 Cal.2d 104, 108 ["a right to intervene should be asserted within a reasonable time and . . . the intervener must not be guilty of an unreasonable delay"]; Civ. Code, § 798.56, subd. (a) [mobilehome tenancy may be terminated if resident fails to comply "with a local ordinance or state law or regulation relating to mobilehomes within a reasonable time"]; Code Civ. Proc., § 1985.3, subd. (d) ["A subpoena duces tecum for the production of personal records shall be served in sufficient time to allow the witness a reasonable time . . . to locate and produce the records"].)

inequitably." (*Walnut Creek Pipe Distributors, Inc. v. Gates Rubber Co*. (1964) 228 Cal.App.2d 810, 815.) Only now is Schellinger willing to recognize that "the contract was not silent as to the time of performance." Again, this is contrary to the position it took at trial when it accepted the applicability of Civil Code section 1657.

DISPOSITION

The judgment is affirmed. The parties shall bear their respective costs on appeal.

_____
Richman, J.

We concur:

_____
Kline, P.J.

_____
Haerle, J.